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Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1992

STATE OF MISSOURI,

Petitioner,

v.

VORNELL PARKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE EQUAL PROTECTION CLAUSE, AS CONSTRUED BY THIS COURT IN *BATSON V. KENTUCKY*, REQUIRES A PARTY TO PRODUCE RACE-NEUTRAL EXPLANATIONS FOR ITS PEREMPTORY STRIKES IN THE ABSENCE OF A PRIMA FACIE SHOWING OF RACIAL DISCRIMINATION BY THE CHALLENGING PARTY.

II.

WHETHER THE ELIMINATION OF A *BATSON* MOVANT'S BURDEN OF ESTABLISHING A PRIMA FACIE CASE AND THE RESULTING REQUIREMENT THAT A RESPONDING PARTY EXPLAIN ITS PEREMPTORY STRIKES UNNECESSARILY AND THEREFORE IMPERMISSIBLY INHIBITS THE JURY SELECTION PROCESS.

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The Supreme Court of Missouri en banc opinion ordering the remand of the cause to State Circuit Court for an evidentiary hearing is not yet reported but is included in the Appendix (A-1-28). The opinion of the Missouri Court of Appeals, Eastern District, transferring the case to the Supreme Court of Missouri, is not reported but is included in the Appendix (A-29-33).

STATEMENT OF JURISDICTION

The Missouri Supreme Court issued its en banc opinion on July 21, 1992. Pursuant to Supreme Court Rule 13.1, the present petition for a writ of certiorari was required to be filed within ninety days of the entry of judgment. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Section 494.480, RSMo Supp. 1991 provides:

> 1. In trials of civil causes each party shall be entitled to peremptorily challenge three jurors. When there are multiple plaintiffs or defendants, all plaintiffs and all defendants shall join in their challenges as if there were one plaintiff and one defendant. The court in its discretion may allocate the allowable peremptory challenges among the parties plaintiff or defendant upon good cause shown and as the ends of justice require. In all cases, the plaintiff shall announce its challenges first.
>
> 2. In all criminal cases, the state and the defendant shall be entitled to a peremptory challenge of jurors as follows:
>
> (1) If the offense charged is punishable by death, the state shall have the right to challenge nine and the defendant nine;
>
> (2) In all other cases punishable by imprisonment in the penitentiary, the state shall have the right to challenge six and the defendant six;

(3) In all cases not punishable by death or imprisonment in the penitentiary, the state and the defendant shall each have the right to challenge two.

3. In all criminal cases where several criminal defendants are tried together, the following provisions shall apply:

(1) Each defendant then on trial shall be allowed separate peremptory challenges as provided in subsection 2 of this section;

(2) The number of peremptory challenges allowed by the state by subsection 2 of this section shall be multiplied by the number of defendants then on trial in each case.

4. Within such time as may be ordered by the Court and from the list of jurors found by the Court qualified to serve in the case, the state shall announce its peremptory challenges and then the defendants thereafter.

3. Section 195.020, RSMo 1986 provides:

1. It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, distribute, or compound any controlled or counterfeit substance except as authorized in sections 195.010 to 195.320.

2. It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance or

an imitation controlled substance in violation of this chapter.

3. It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grown, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, inhale, or otherwise introduce into the human body a controlled substance or an imitation controlled substance in violation of this chapter.

4. It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

5. It is unlawful for any person to use, or to possess with intent to use, an imitation controlled substance in violation of this chapter.

6. It is unlawful for any person to deliver, possess with intent to deliver, manufacture with intent to deliver, or cause to be delivered any imitation controlled substance.

7. It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication, or to post or distribute in any public place, any advertisement or solicitation with reasonable knowledge that the purpose of the advertisement or solicitation is to

promote the distribution of imitation controlled substances.

STATEMENT OF THE CASE

Respondent, Vornell Parker, was charged by information as a prior and persistent offender with possession of cocaine, § 195.020, RSMo 1986. The cause went to trial before a jury on December 11, 1989.

After both parties concluded their voir dire of the venire panel, the parties made their peremptory strikes. The court noted that the state exercised five of its peremptory strikes against blacks, leaving five remaining on the panel. Respondent then raised a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 697 (1986), the sum total of which consisted of the following statement:

> This will be the defense's motion for Batson, the defense moves to quash the entire jury panel on the motion for mistrial on the basis of the state using five of its peremptory strikes to strike black jury members on the basis of race alone, in that there were other jurors similarly situated that could have been struck.

(A-35). The court overruled respondent's motion without a hearing, discharging the remainder of the qualified but not selected venire (A-35). The court did not require the prosecutor to present race-neutral reasons for his peremptory strikes (A-35).

The evidence presented at trial showed that in mid-February, 1989, Detective Richard Will received information from a confidential informant that Vornell Parker and Aaron Parker

were storing a large quantity of cocaine at an apartment next door to their residence. Detective Will reported this information to his supervisor, Sergeant Donald Henderson, who ordered a three-week surveillance of the residence. During this surveillance, police observed respondent visit the residence next door to his apartment several times carrying a briefcase, which the informant had explained respondent used to transfer drugs.

The police obtained a search warrant, which they executed on March 3, 1989. After knocking and announcing their presence at the front door to no response, Detective Will used a sledge hammer to force open the front door. As the officers entered, they saw respondent running toward the kitchen and several other individuals sitting in the living room. Detective Will chased respondent and observed him toss a bag of cocaine behind the refrigerator as he ran through the kitchen. The search of the premises revealed a total of three bags of cocaine, approximately 3.36 grams, as well as one bag of baking soda, commonly used to "cut" cocaine.

Mr. Parker did not testify but called three other witnesses in his defense, which was a denial that he had possessed any cocaine. At the close of the evidence, instructions and arguments of counsel, the jury found respondent guilty of possession of cocaine. On February 9, 1990, the court sentenced respondent as a prior and persistent offender to seven years imprisonment.

On June 18, 1990, respondent filed a *pro se* motion to vacate judgment and sentence pursuant to Missouri Supreme Court Rule 29.15. The court appointed the special public defender to represent respondent on August 6, 1990 and after being granted one extension respondent filed a first amended motion on September 24, 1990. After conducting an evidentiary hearing, the court issued its Findings of Fact, Conclusions of Law and Decree on November 30, 1990, denying respondent's motion.

Respondent filed a timely appeal in the Missouri Court of Appeals, Eastern District, from both the conviction and sentence and the denial of his Rule 29.15 motion. The Court of Appeals consolidated the direct and post-conviction appeals. Respondent raised three claims of error, including one concerning the denial of his *Batson* challenge without a hearing. On January 21, 1992, the court denied two of respondent's claims but transferred the case to the Missouri Supreme Court for a determination of the *Batson* issue, in light of recent Missouri appellate decisions and decisions of this Court (A-29-33).

The case was argued before the Missouri Supreme Court en banc. On July 21, 1992, the Court issued an opinion remanding the case for a hearing to examine the prosecutor's reasons for his peremptory strikes (A-19-20). The Court formulated a unitary procedure for the determination of *Batson* claims, ordering that trial courts no longer make a finding of whether a movant has made a prima facie case (A-15-19). This petition for a writ of certiorari follows.

ARGUMENT

I.

WHETHER THE EQUAL PROTECTION CLAUSE, AS CONSTRUED BY THIS COURT IN *BATSON V. KENTUCKY*, REQUIRES A PARTY TO PRODUCE RACE-NEUTRAL EXPLANATIONS FOR ITS PEREMPTORY STRIKES IN THE ABSENCE OF A PRIMA FACIE SHOWING OF RACIAL DISCRIMINATION BY THE CHALLENGING PARTY.

In *State v. Parker*, No. 74517 (Mo. banc July 21, 1992), the Missouri Supreme Court categorically eliminated the requirement that a movant challenging an opposing party's peremptory strikes make a prima facie showing that those strikes were racially motivated, thereby modifying the constitutional doctrine enunciated by this Court in *Batson v. Kentucky* , 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 697 (1986). The Missouri Supreme Court ordered trial courts to no longer make a finding of a prima facie case and directed responding parties to produce reasons for their peremptory strikes upon the raising of a *Batson* motion (A-15-19). The Missouri Supreme Court recognized that its unitary procedure differed from the one enunciated by this Court, but found that its own was "superior to the bifurcated procedure suggested by *Batson*" (A-19). Whether the requirement of a prima facie showing is merely an evidentiary procedure "suggested" by this Court, or whether it comprises a necessary element of the constitutional test formulated by this Court as central to the holding in *Batson*, is the core issue presented in this petition.

The holding of the Supreme Court of Missouri in *State v. Parker* must be viewed in context of its prior decision, *State v. Antwine*, 743 S.W.2d 51 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988). In *Antwine*, the

Supreme Court of Missouri ordered that the state's explanations must be examined in determining the existence of a prima facie case:

> As a practical matter, the third element of the prima facie case under *Batson* . . . requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges.

Id. at 64. Nothing in *Batson* supports the notion that explanations should be required in evaluating the presence or absence of a prima facie case. The Supreme Court of Missouri later acknowledged that it "expanded upon" *Batson* in so holding, inferably as a matter of economy and convenience in appellate review of these claims. *State v. Griffin*, 756 S.W.2d 475, 481 (Mo. banc 1988), *cert. denied*, 490 U.S. 1113, 109 S.Ct. 3175, 104 L.Ed.2d 1036 (1989). As a result of the "*Antwine* rule", prosecutors were categorically required to give explanations for their peremptory challenges whenever a claim under *Batson* or *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), was made, and appeals have been remanded for further proceedings when they did not do so. *See, e.g. State v. States*, 809 S.W.2d 6, 7 (Mo.App. E.D. 1990); *State v. Johnson*, 744 S.W.2d 879, 880-881 (Mo.App. E.D. 1988).

In deciding the present case, the Supreme Court of Missouri explicitly reaffirmed and clarified the procedure set forth in *Antwine*. The court justified its departure from *Batson*:

> The United States Supreme Court has repeatedly emphasized that it has not formulated, and does not intend

> to formulate, particular rules or procedures for the implementation of *Batson* and its progeny. (A-14).

The Supreme Court of Missouri rationalized that (1) its own procedures for resolution of Batson claims "need not mirror Batson so long as they do not offend constitutionally mandated protections"; and (2) that the "establishment of the prima facie case is of no independent constitutional significance" (A-14). Consequently, in order to affirm the court's "*Antwine* rule" expanding Batson, it baldly eliminated the necessity for a *Batson* movant to make a prima facie showing of racial discrimination (A-15-19).[1]

In *Batson*, however, this Court clearly placed the burden upon the defendant to show a prima facie case of racial discrimination based upon patterns of state peremptory strikes, the prosecution's questions and statements during voir dire, and "all [other] relevant circumstances." *Batson*, 476 U.S. at 96-97. If -- and only if -- a prima facie case was made, the state was required to present racially neutral explanations for its peremptory challenges. *Id.*, 476 U.S. at 97; *see also Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 1865-1866, 114 L.Ed.2d 395 (1991).

In arriving at its evidentiary formulation, modeled on Title VII of the 1964 Civil Rights Act, this Court noted that the ques-

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[1]Although Article I, § 2 of the Missouri Constitution (1945) contains an equal protection guarantee, the Supreme Court of Missouri made no reference to and expressed no reliance upon the state constitutional provision, instead basing its decision upon the Equal Protection Clause of the United States Constitution as interpreted by Batson and other decisions of this Court (A-14). Accordingly, this case does not present any issue concerning independent adequate state grounds.

tion of "whether the defendant had met his burden of proving purposeful discrimination on the part of the State" was "at the heart of the portion of *Swain v. Alabama* [380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)] we reexamine today." *Batson, supra*, 106 S.Ct. at 1719. "As in any equal protection case, the 'burden is of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.'" *Id.* at 1721, citing *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S.Ct. 643, 646-647, 17 L.Ed.2d 599 (1967), and *Tarrance v. Florida*, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572 (1903).

There is no question that this Court in *Batson*, while rejecting the "crippling burden of proof" allocated to defendant by judicial interpretations of *Swain v. Alabama, supra*, placed the burden of establishing a prima facie case squarely on the shoulders of the defendant. The state was required to come forward with its explanations for challenging jurors only after the burden had shifted to the state to rebut the defendant's prima facie case. *Batson*, 106 S.Ct. at 1723. As Justice White noted in his concurring opinion:

> The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry; it is not unconstitutional without more, to strike one or more blacks from the jury. The judge may not require the prosecutor to respond at all.

Id. at 1726 (White, J., concurring opinion).

The Supreme Court of Missouri thus broke with the procedure enunciated in *Batson* in deciding *Parker*, citing as authority one sentence of footnote 24 of the *Batson* decision (A-14). Footnote 24 reads: "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our

holding today." *Batson*, 106 S.Ct. at 1725, n. 24.

The Supreme Court of Missouri, however, misconstrues the significance of the above-quoted sentence. Rather than granting lower courts freedom to completely eliminate the prima facie case, this Court allowed lower courts some "leeway to determine whether a defendant has established a prima facie case" at all. *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987). In other words, states may determine the criteria by which they assess the existence of a prima facie case. This is quite contrary to relieving a movant of a burden of making a prima facie showing altogether -- a result not contemplated by any decision of this Court, and one which offends the evidentiary formulation articulated by this Court in either *Batson* or Title VII cases. *See,e.g. Hernandez v. New York, supra*, 111 S.Ct. at 1865-1866; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 1094-1095, 67 L.Ed.2d 207 (1981); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976).

Moreover, this Court acknowledged in *Texas Dept. of Community Affairs, supra*, that it used the term "prima facie case" in the Title VII context to denote "the establishment of a *legally mandatory*, rebuttable presumption". *Id.*, 101 S.Ct. at 1094, n. 7 (emphasis added). The Court recognized that the prima facie case "serves an important function in litigation" in that "the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 1094, n. 8. The prima facie case, therefore, is an integral factor in the resolution of *Batson* claims, as *Batson* based its procedure upon Title VII of the 1964 Civil Rights Act.

A few other jurisdictions have eliminated a *Batson* movant's initial burden of demonstrating a prima facie case. See *State v.*

Jones, 358 S.E.2d 701, 703 (So.Car. 1987); *State v. Holloway*, 553 A.2d 166, 171-72 (Conn. 1989), *cert. denied*, 490 U.S. 1071, 109 S.Ct. 2078, 104 L.Ed.2d 643 (1989); *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989); *Hayes v. State*, 405 S.E.2d 660, 669 (Ga. 1991). The authority upon which the courts base their departure from *Batson* is varied. For example, the *Jones* court cites the "vague guidelines set forth by the United States Supreme Court" with disdain, choosing instead a "bright line test" which requires a *Batson* hearing to be conducted whenever a defendant so requests. *Jones*, *supra*, at 703. The Supreme Court of Connecticut, while citing this language with approval, altered the evidentiary formulation under the guise of its "inherent supervisory authority over the administration of justice." *Holloway*, *supra*, at 171-72.

Petitioner submits that the Supreme Court of Missouri's directive in the present case eliminating the necessity of a prima facie showing conflicts with this Court's central holding of *Batson*. As a result of the Supreme Court of Missouri's decision in *Parker*, petitioner is denied the opportunity to argue the absence of a prima facie case and must produce explanations for its strikes whenever a *Batson* claim is raised. Such a result is directly contrary to the procedures set forth in *Batson* which place the burden of establishing the prima facie case on the movant and not on the party responding to the *Batson* challenge, consistent with this Court's decisions in Title VII cases. Furthermore, while this Court has vested lower courts with discretion in determining the criteria by which they assess the existence of a prima facie case, it has never contemplated or authorized the elimination of such a showing altogether as the starting point for the resolution of a *Batson* claim.

Petitioner submits that the Supreme Court of Missouri has misinterpreted and misapplied this Court's decisions *Batson v. Kentucky*, *supra*, and *Hernandez v. New York*, *supra*. Accordingly, petitioner respectfully requests that this Court grant certiorari.

II.

WHETHER THE ELIMINATION OF A *BATSON* MOVANT'S BURDEN OF ESTABLISHING A PRIMA FACIE CASE AND THE RESULTING REQUIREMENT THAT A RESPONDING PARTY EXPLAIN ITS PEREMPTORY STRIKES UNNECESSARILY AND THEREFORE IMPERMISSIBLY INHIBITS THE JURY SELECTION PROCESS.

Traditionally, parties have been allowed unfettered exercise of peremptory strikes, in recognition of the role the peremptory strike plays in the process of selecting a fair and impartial jury. In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 697 (1986), this Court placed a narrow limitation on the use of peremptory strikes, directing that they may not be racially motivated. At the same time, however, this Court has also acknowledged that the jury selection process should not be unnecessarily disrupted. In *State v. Parker*, No. 74517 (Mo. banc, July 21, 1992) the Supreme Court of Missouri ignored this Court's directive and eliminated the initial burden on a *Batson* movant to make a prima facie showing, thus requiring an opposing party to produce explanations for its strikes whether or not any inference of racial discrimination exists. Petitioner submits this practice constitutes an unwarranted and therefore impermissible interference with the party's exercise of its peremptory strikes.

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), this Court recognized and recounted the "very old credentials" of the peremptory challenge. *Id.*, 380 U.S. at 212-220, 85 S.Ct. at 831-836. This Court defined the "essential nature" of the peremptory strike as being one exercised "without a reason stated, without inquiry and without being subject to a court's control." *Id.*, 380 U.S. at 220, 85 S.Ct. at 836. The recognized function of the peremptory challenge was "not

only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Id.*, 380 U.S. at 219, 85 S.Ct. at 835. Thus, this Court found that the peremptory challenge remains "one of the most important rights secured to the accused", supporting the "long and widely held belief the peremptory challenge is a necessary part of trial by jury." *Id., quoting Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 441, 38 L.Ed. 208 (1894).

This Court carved out a narrowly tailored exception to the unfettered exercise of the peremptory strike in *Batson v. Kentucky, supra*. The equal protection guarantee as contained in the Fourteenth Amendment to the United States Constitution provided justification to exclude peremptory strikes exercised against potential jurors "solely on account of their race." *Id.*, 476 U.S. at 89, 106 S.Ct. at 1719. This Court considered the potential harm to the "fair trial values served by the peremptory strike", *id.*, 476 U.S. at 98, 106 S.Ct. at 1724, but found assurance in the assumption that trial judges "will be alert to identify a prima facie case of purposeful discrimination." *Id.*, 476 U.S. at 99, 106 S.Ct. at 1724, n. 22.

Several justices of this Court have recently expressed concern over the potential erosion of the traditional function of the peremptory strike. For example, Justice Scalia, joined by Chief Justice Rehnquist in a dissenting opinion, defined the peremptory strike as a "permanent and universal feature of our jury trial system", noting:

> The peremptory challenge system has endured so long because it has unquestionable advantages . . . [I]t is a means of winnowing out possible (though not demonstrable) sympathies and antagonisms on both sides, to the end that the jury will be the fairest possible. In a

> criminal-law system in which a single biased juror can prevent a deserved conviction or a deserved acquittal, the importance of this device should not be minimized.

Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364, 1378, 113 L.Ed.2d 411 (1991) (J. Scalia, dissenting).

Perhaps the strongest recent expressions of support for the traditional peremptory strike as one exercised "without inquiry," *Swain, supra*, appeared in *Georgia v. McCollum*, ___ U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), in which this Court allowed the state standing to challenge a criminal defendant's use of racially motivated peremptory strikes. Justice Thomas, concurring in the principal judgment, explained that he wrote separately to express his "general dissatisfaction" with the Court's "continuing attempts to use the Constitution to regulate peremptory challenges." *Id.*, 112 S.Ct. at 2359 (J. Thomas, concurring). Justice Scalia dissented, criticizing this Court's "use of the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair." *Id.*, 112 S.Ct. at 2365 (J. Scalia, dissenting).

In recognition of the important role of the peremptory strike, this Court has emphasized that trial courts, while granted discretion to develop rules by which to implement the *Batson* holding, should not unnecessarily interfere with the jury selection process. *Powers v. Ohio*, 111 S.Ct. at 1374. Curiously, the Supreme Court of Missouri cites *Powers* as authority to eliminate a *Batson* movant's prima facie showing, the very means by which a trial court can determine whether even an inference of racial discrimination exists (A-14). By relieving a movant of the initial burden of making a prima facie case of discriminatory intent, the Supreme Court of Missouri has demanded that the responding party always produce explanations for its strikes, whether necessary or not. Thus, the traditional peremptory strike

-- on exercised "without a reason stated, without inquiry and without being subject to a court's control," *Swain, supra*, -- has been eliminated as well.

This interference with the traditional and recognized role of the peremptory strike is unjustified and irreconcilable with past decisions of this Court. *See, Batson v. Kentucky, supra*; *Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *Powers v. Ohio, supra*. Accordingly, petitioner respectfully requests that this Court grant certiorari.

CONCLUSION

Petition respectfully requests that the petition for writ of certiorari be granted and that the judgment of the Supreme Court of Missouri remanding the cause for an evidentiary hearing regarding the state's use of peremptory strikes be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 74517
	)	
VORNELL PARKER,	)	
	)	
Appellant,	)	
	)	
and	)	
	)	
VORNELL PARKER,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

Honorable Daniel T. Tillman, Judge

Vornell Parker appeals his conviction for possession of cocaine. § 195.020, RSMo 1986. After opinion, the Missouri Court of Appeals, Eastern District, transferred the case to this Court to reexamine ***State v. Antwine***, 743 S.W.2d 51 (Mo. banc 1987). The case is remanded.

Appellant does not challenge the sufficiency of the evidence. The evidence, viewed in the light most favorable to the verdict, shows that Detective Richard Will received a tip from a confidential informant that appellant and his brother, Aaron, were storing a large amount of cocaine in an apartment next door to their residence. Detective Will reported the information to his supervisor, Sergeant Henderson, who ordered surveillance of the residence. Detectives Will and Swederski participated in the surveillance and saw appellant carrying a briefcase which, the informant reported, appellant used to transfer drugs.

On March 3, 1989, the police obtained a search warrant and executed it. After the police unsuccessfully attempted to gain admission to appellant's dwelling by knocking and announcing their presence, Will forced open the front door with a sledge hammer. As the police entered the residence, they observed appellant running toward the kitchen. Will chased appellant and saw him toss a bag of cocaine behind the refrigerator. A subsequent search revealed two additional bags of cocaine.

After trial, the jury found appellant guilty of possession of cocaine in violation of § 195.020, RSMo 1986. On February 9, 1990, the court sentenced appellant as a prior and persistent offender to seven years imprisonment. Appellant filed a ***pro se Rule 29.15*** motion. Appointed counsel filed a timely amended motion. After conducting an evidentiary hearing, the court

denied appellant's motion.

Appellant's first point on appeal is a claim involving equal protection as it relates to the government's exercise of peremptory challenges. Appellant's claim is framed in the alternative. He contends that he established a prima facie case under ***Batson v. Kentucky***, 476 U.S. 79 (1986); he argues in the alternative that, even if he failed to establish a prima facie case under ***Batson***, it was error for the trial court not to have required the state to explain its peremptory strikes as directed in ***State v. Antwine***, 743 S.W.2d 51, 64 (Mo. banc 1987). Appellant claims that the trial court's failure to comply with ***Antwine's*** directive prevented him from establishing that the state's strikes were racially motivated in violation of his and the excluded venirepersons' equal protection rights.

A brief recapitulation of the development of the law affecting equal protection and peremptory strikes is warranted, to serve as a background for the analysis of appellant's claim. The United States Supreme Court has long recognized that the United States Constitution prohibits all forms of purposeful racial discrimination in the selection of jurors. ***See Martin v. Texas***, 200 U.S. 316, 319 (1906). Trying a criminal defendant before a jury from which members of the defendant's race have been purposefully excluded denies that person equal protection of the law because it denies that person the protection that a trial by jury is intended to secure. ***Strauder v. West Virginia***, 100 U.S. 303, 309 (1880). In addition, discrimination in jury selection violates the constitutional rights of the excluded venirepersons by denying them the opportunity to participate in the administration of justice on an equal footing with other citizens. ***Id.*** at 308.

The United States Supreme Court first sought to protect equal protection rights from encroachment by prosecutors exercising peremptory challenges in ***Swain v. Alabama***, 380 U.S.

202 (1965). In ***Swain*** the Court emphasized the importance of peremptory challenges in ensuring an impartial jury. The Court found that equal protection rights of a defendant are violated if the defendant can show that the prosecutor consistently and systematically struck African-Americans from the venire in case after case regardless of the circumstance, with the result that no African-Americans ever served on petit juries. ***Id.*** at 223. The ***Swain*** burden of proof imposed a nearly insurmountable obstacle to the vindication of black persons' equal protection rights as evidenced by the fact that in the twenty-one years after ***Swain,*** only two defendants were able to establish a case of discrimination. Theodore McMillian & Christopher J. Petrini, ***Batson v. Kentucky: A Promised Unfulfilled,*** 58 UMKC L. Rev. 361, 365 (1990).

In ***Batson***, the United States Supreme Court recognized that the crippling burden of proof imposed upon defendants by ***Swain*** nearly immunized a prosecutor's use of peremptory challenges from constitutional scrutiny. The ***Batson*** Court replaced the ***Swain*** test with an evidentiary framework, modeled on Title VII of the 1964 Civil Rights Act, that permits a defendant to prove discrimination in selection of the petit jury solely by evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. ***Id.*** at 365-66; ***See also*** L.Ashley Lyu, ***Getting at the Truth: Adversarial Hearings in Batson Inquiries,*** 57 Fordham L.Rev. 725, 729 (1990); ***Batson***, 476 U.S. at 96.

The three-step process delineated by the Court in ***Batson*** allows a defendant to challenge the state's peremptory strikes to vindicate his own equal protection rights. ***Id.*** at 96-98. The first step requires the defendant to come forward with a prima facie showing of purposeful discrimination. ***Id.*** at 96-97. To prove a prima facie case under ***Batson***, the defendant must show that he is a member of a cognizable racial group and the prosecutor

exercised peremptory challenges to remove members of the defendant's race from the venire. The defendant is entitled to rely on the fact that peremptory challenges permit prosecutors to discriminate and to rely on any other relevant circumstances to raise an inference that the prosecutor used peremptory challenges to exclude venirepersons from the petit jury on account of race. ***Id.*** at 96.

Subsequently the United States Supreme Court dispensed with the ***Batson*** prima facie case requirement of racial identity between the defendant and the excluded venireperson in ***Powers v. Ohio,*** 111 S.Ct. 1364 (1991). In ***Powers*** the Supreme Court recognized that ***Batson*** challenges were meant to protect not only the defendant's equal protection rights but also the equal protection rights of excluded venirepersons. ***Id.*** at 1370. To facilitate the vindication of these excluded venirepersons' rights, the Court held that a criminal defendant has standing to assert the equal protection rights of venirepersons excluded for racial reasons from their jury. ***Id.*** at 1368-70.[1]

In ***Edmonson v. Leesville,*** 111 S.ct. 2077 (1991), the Court again focused on protecting venirepersons from racial discrimination and maintaining the public's confidence in the judicial process in deciding that racially motivated strikes by civil litigants violate the Constitution and may be challenged by the opposing party. ***Id.*** at 2088.[2] The importance of protecting

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[1]The defendant's race becomes irrelevant when the defendant asserts a minority venireperson's equal protection rights. The critical inquiry is the venireperson's membership in a cognizable racial minority.

[2]The ***Edmonson*** Court found that peremptory challenges were not constitutionally required but were simply a long-standing legislative or common law device to allow litigants to assist the government in the selection of an impartial jury. ***Id.*** at 2083. The litigant's actions in striking venirepersons are so closely tied to governmental functions and authority that it is fair to deem

the dignity of persons and the integrity of the courts from damage inflicted through racially motivated peremptory strikes was recently reaffirmed in ***Georgia v. McCollum,*** 60 U.S.L.W. 4574 (U.S. June 18, 1992). In ***McCollum,*** the Supreme Court determined that the state may challenge a criminal defendant's peremptory strikes to vindicate the excluded venirepersons' and society's interest in eradicating racial discrimination from the courtroom. ***Id.*** at 4579.

After ***McCollum***, any party may invoke a ***Batson*** claim. Once a party has established a prima facie case under ***Batson***, the other party must give race-neutral reasons for the challenged peremptory strikes. The prosecutor's explanations must be more than an unsubstantiated denial of discriminatory purpose or affirmance of good faith, but an explanation rising to the level of exclusion for cause is not required. ***Id.*** at 97-98. To be sufficient the explanation need only be race-neutral, reasonably specific and clear, and related to the particular case to be tried. ***Id.*** at 98. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. ***State v. Hernandez,*** 111 S.Ct. 1859, 1866 (1991). Even if the prosecutor's explanation results in the disproportionate removal of minority venireperson, disparate impact alone will not convert a facially race-neutral explanation into a ***per se*** violation of equal protection. ***Id.*** at 1867.

Once the prosecutor offers a sufficient race-neutral explanation for the challenge, the prima facie case is rebutted. The ***Batson*** inquiry moves on to the third step, which requires the court to determine whether the defendant has established purposeful discrimination. ***Id.*** at 1868. To succeed, the

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the civil litigant a state actor when exercising peremptory challenges. ***Id.*** at 2083-87. The civil litigant is merely exercising delegated governmental power, thus is subject to the strictures of the Constitution. ***Id.*** at 2088.

defendant must show that the prosecutor's proffered reasons are merely pretextual and that the true motivation for the strike was racial. ***Antwine***, 743 S.W.2d at 64; ***see also Texas Dept. of Community Affairs v. Burdine,*** 450 U.S. 248, 253-56 (1981). The focus at this stage of the inquiry is upon the plausibility of the prosecutor's explanation in view of the totality of the facts and circumstances of the case. Much of the determination, by necessity, turns upon evaluation of intangibles such as credibility and demeanor. Trial judges are, therefore, vested with considerable discretion in determining whether the defendant established purposeful discrimination. ***Hernandez,*** 111 S.Ct. at 1869; ***Antwine,*** 743 S.W.2d at 65-66.

While the Supreme Court has delineated the constitutional concerns at issue, it has explicitly and repeatedly denied any intention to prescribe particular rules or procedures for the implementation of ***Batson*** and its progeny. ***Batson***, 476 U.S. at 99; ***Edmonson,*** 111 S.Ct. at 2089; ***Powers,*** 111 S.Ct. at 1374. The task of formulating procedures and rules has been left to the lower courts. ***Powers,*** 111 S.Ct. at 1374.

Before addressing appellant's ***Batson*** claim on the merits, it is necessary to confront the state's assertion that appellant failed to preserve his ***Batson*** claim with a timely objection. It is unclear whether appellant raised the claim before or after exercising peremptory strikes. The record reflects that appellant raised a ***Batson*** objection, at the latest, prior to any of the qualified and eligible but not selected venirepersons' being excused.

While ***Batson*** recognized the right of criminal defendants to challenge racially motivated strikes by the prosecutor, the Court explicitly predicated the right upon the defendant's timely objection. ***See Batson***, 476 U.S. at 96-99; ***United States v. Dobynes,*** 905 F.2d 1192, 1196 (8th Cir.), ***cert. denied,*** 111 S.Ct.

206 (1991). Subsequent to ***Batson***, "both the federal and state courts have consistently held that the failure to make a timely objection effectively waives any arguments based on improprieties in jury selection which the defendant might urge pursuant to ***Batson***." Brian J. Serr & Mark Maney, ***Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance***, 79 J. Crim. L. and Criminology 1, 19 (1988); ***See, e.g. United States v. Cashwell,*** 950 F.2d 699, 704 (11th Cir. 1992); ***United States v. Masat,*** 948 F.2d 923, 927 (5th Cir. 1991); ***State v. English,*** 795 S.W.2d 6109, 612 (Mo. App. 1990); ***People v. Lockhart,*** 558 N.E.2d 1345, 1350 (Ill. App. 1 Dist. 1990).

Although it is clear that a defendant must timely object to preserve a ***Batson*** claim, the United States Supreme Court has declined to decide precisely when an objection must be made. ***Batson,*** 476 U.S. at 99-100; ***Ford v. Georgia,*** 111 S.Ct. 850, 857 (1991). The Court has recognized that local practices should govern timeliness in the context of the various procedures employed to try criminal cases. ***Id.*** at 857. State courts occupy a superior position to adopt general rules regarding the timeliness of ***Batson*** claims. ***Id.*** at 857.

This Court is confronted for the first time with determining when a ***Batson*** claim must be raised in Missouri. Concern for protecting to the maximum extent possible the equal protection rights of both the accused and the excluded venirepersons, consistent with the constraints imposed by Missouri's jury selection process, guides the decision. ***See Batson,*** 476 U.S. at 87; ***Powers,*** 111 S.Ct. at 1367-68.

Appellant asserts that a ***Batson*** challenge raised before the venire is discharged and the jury is sworn is timely. The state urges adoption of a timeliness rule that would require ***Batson*** claims to be made after the state makes its peremptory strikes

but before a defendant exercises his peremptory strikes. The state's position has recently been adopted by both the eastern and western districts of the Missouri Court of Appeals. ***State v. McMahan,*** 821 S.W.2d 110, 113 (Mo. App. 1991); ***State v. Davis,*** 1992 WL 71620 (Mo.App April 14, 1992); ***State v. Smith,*** 1992 WL 114419 (Mo. App. June 2, 1992).

This Court finds that a ***Batson*** challenge raised before the venire is excused and the jury sworn is timely. Although the language of the cases upon which ***McMahan, Davis,*** and ***Smith*** rely would seem to support the holdings, the extension of existing precedent to require defendants to raise ***Batson*** before exercising their own strikes is not supported by the reasoning of the cases upon which ***McMahan, Davis*** and ***Smith*** rely, ***see State v. English,*** 795 S.W.2d 610, 612 (Mo. App. 1990); ***State v. Smith,*** 791 S.W.2d 744, 747 (Mo. App. 1990); ***State v. Lawrence,*** 791 S.W.2d 729, 730 (Mo. App. 1990), all of which involved challenges made after the venire was dismissed. More importantly, the court of appeals decisions relied on the rationale that waiver was appropriate to prevent post-discharge ***Batson*** challenges. ***See English,*** 795 S.W.2d at 612; ***Smith,*** 791 S.W.2d at 747. The districts reasoned that sustaining a ***Batson*** challenge after discharge of the venire necessitates the calling of a new venire and the selection of a new jury, thereby delaying justice and wasting judicial time and resources. ***See English,*** 795 S.W.2d at 612; ***Smith,*** 791 S.W.2d at 747.

While requiring defendants to raise ***Batson*** prior to exercising their own peremptory strikes promotes judicial economy to the same extent as requiring defendants to raise ***Batson*** before the venire is excused, no persuasive rationale for requiring defendants to make the ***Batson*** challenge at the earlier time has been suggested. The sole argument advanced in support of requiring defendants to raise ***Batson*** immediately after the state's peremptory strikes is that trial error should be brought

to the trial court's attention at the earliest possible opportunity. ***See Davis,*** 1992 WL 71620, *2; ***English,*** 795 S.W.2d at 612. As noted by the state, once the state has made its strikes, the defendant has all the facts and information necessary to make a ***Batson*** challenge. The validity of the state's position, however, is suspect in view of the ***de minimis*** temporal distinction between requiring defendants to raise ***Batson*** before exercising their strikes and requiring them to raise the challenge before the venire is dismissed. In any event, examination of the source of the "earliest possible opportunity" rule reveals that the purpose behind the rule is not to impose an arbitrary procedural hurdle, but, rather, to ensure that trial courts will be able to take corrective action. ***See State v. Newman,*** 699 S.W.2d 29, 32 (Mo. App. 1985).

This Court reasons that the timeliness rule for ***Batson*** challenges should be devised so as to allow the trial court the opportunity to correct errors and avoid prejudice in the first instance, without unduly hampering the vindication of the equal protection rights ***Batson*** is meant to protect. ***See Government of Virgin Islands v. Forte,*** 806 F.2d 73, 75-6 (3d Cir. 1986), ***cert. denied***, 111 S.Ct. 2262 (1991); ***State v. Wiley***, 513 So.2d 849, 862-63 (L.a. App. 2 Cir. 1987). The error at issue in a ***Batson*** challenge is, of course, the state's racially discriminatory use of peremptory strikes in violation of both the accused's and the excluded venirepersons' equal protection rights. ***Powers,*** 111 S.Ct. at 1368-69. Quashing the panel and commencing the jury selection process anew does not really correct the error. The defendant is simply accorded a new opportunity to obtain a jury composed according to race-neutral criterion; the discrimination endured by the excluded venirepersons goes completely unredressed since they remain wrongfully excluded from jury service.

Requiring defendants to make ***Batson*** challenges prior to the

venire's dismissal, on the other hand, allows the trial court to determine whether a constitutional violations has occurred while there remains time to correct the error by disallowing the offending strike.[3] ***See Dobynes,*** 905 F.2d at 1196; ***United States v. Forbes,*** 816 F.2d 1006, 1011 (5th Cir. 1987). Judicial time and resources, moreover, are maximized because there is no need to quash the jury and call a new venire. ***See Pacee v. State,*** 816 S.W.2d at 859; ***McGruder v. State,*** 560 So.2d 1137, 1142-43 (Ala. Cr. App 1989); ***United States v. Erwin,*** 793 F.2d 656, 667 (5th Cir.), ***cert. denied,*** 479 U.S. 991 (1986); ***McGruder,*** 560 So.2d at 1143; ***Simmons v. Commonwealth,*** 746 S.W.2d 393, 398 (Ky.), ***cert. denied,*** 489 U.S. 1059 (1988); ***English,*** 795 S.W.2d at 612; ***Smith,*** 791 S.W.2d at 747. The Court's ability to correct error is not enhanced by requiring ***Batson*** to be raised before the defendant exercises his own peremptory strikes.

Despite contentions to the contrary,[4] no appreciable interference with the orderly procedure of strikes is caused by allowing defendants to raise ***Batson*** after exercising their own strikes. The court can easily allow the state to exercise fully its peremptory strikes by removing another venireperson in an race-neutral manner should the court find the challenged strike was racially motivated. Furthermore, after ***Georgia v. McCollum, Batson*** challenges will be procedurally simplified if both sides are required to make challenges at the same time. Since strikes are sometimes conducted off the record, it will be difficult for a reviewing court to determine whether the challenge was raised

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[3]Trial courts should refrain from releasing venirepersons who have been peremptorily struck until the venire is excused.

[4]The state argues that § 494.480.4 requires the state makes its peremptory strikes first, followed by the defendant and that requiring the defendant to make a ***Batson*** motion before exercising the defendant's strikes furthers the orderly procedure of defense strikes being made after the state's strikes.

before the defendant exercised the strikes. Effective review will be facilitated, therefore, by requiring all parties to raise ***Batson*** prior to the venire's discharge.

In sum, this Court agrees that "[i]t is the release of the unselected members of the venire and the problems and difficulties created thereby which truly govern the timeliness of a ***Batson*** motion." ***McGruder,*** 560 So.2d at 1143; ***see also United States v. Masat,*** 948 F.2d 923 (5th Cir. 1991); ***Dobynes,*** 905 F.2d at 1196; ***United States v. Romero-Reyna,*** 867 F.2d 834, 836-37 (5th Cir.), ***appeal after remand,*** 889 F.2d 559 (5th Cir. 1989), ***cert. denied,*** 494 U.S. 1084 (1990). This Court, therefore, holds that appellant's ***Batson*** challenge raised immediately prior to the venire's being excused was timely made.

The Court now turns to the merits of appellant's equal protection complaint. An examination of the relevant facts reveals that after both parties completed their peremptory strikes, the trial court asked the attorneys how many African-Americans were on the venire and how many had been struck by the state. Both attorneys agreed that there had been ten African-Americans on the venire and that the state struck five of them. The court, appearing to rely on numbers and population ratio, stated that there was no need to have a hearing but offered to require the state to provide explanations for its strikes if appellant requested. Appellant's counsel responded by raising a ***Batson*** objection and moving to quash the jury panel on the ground that the state used five of seven peremptory strikes against African-American venirepersons on the basis of race alone and similarly situated white venirepersons were not struck. The court summarily overruled the motion, then asked the prosecutor if he thought it was necessary to have a hearing. The prosecutor declined to make a record of the strikes unless required to do so by the

court.[5]

Appellant contends that he established a prima facie case under ***Batson*** and that the trial court's error in failing to require the state to come forward with race-neutral explanations for the five strikes deprived him of the opportunity to vindicate his and the excluded venirepersons' rights to equal protection. Appellant argues in the alternative that even if he failed to establish a prima facie case under ***Batson,*** it was error for the trial court not to require the state to explain its peremptory strikes because the Court in ***State v. Antwine,*** 743 S.W.2d 51, 64 (Mo. banc 1987), directed trial courts to consider the prosecutor's explanation as part of the process of determining whether the defendant has established a prima facie case. Appellant claims that the trial court's failure to comply with ***Antwine's*** directive prevented him from establishing that the state's strikes were racially motivated in violation of his and the excluded venirepersons' equal protection rights. Appellant's claim under ***Antwine*** is dispositive.

To reiterate, ***Antwine*** directs that the trial court consider, as part of the defendant's prima facie case, the prosecutor's explanation for its peremptory strikes. ***Antwine***, 743 S.W.2d at 64. The state concedes that the trial court did not comply with the ***Antwine*** directive to consider the prosecutor's explanations as part of the prima facie case. The state contends, however, that the ***Antwine*** directive requiring the state to come forward

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[5]The state contends that appellant waived his claim as a consequence of his failure to insist upon explanations from the prosecutor when the trial court offered to require the state to provide race-neutral explanations. Since it appears that ***Antwine*** contemplates that trial court will request the prosecutor to provide reasons for the strikes without having been asked to do so by the defendant, ***see State v. Robinson,*** 811 S.W.2d 460, 462 (Mo. App. 1991), this Court will consider appellant not to have waived his ***Batson*** claim.

with race-neutral explanations as part of the prima facie case is in conflict with ***Batson*** because, after ***Hernandez***, the state is, in effect, forced to waive any challenge to the defendant's failure to establish a prima facie case.

The state is correct that under the procedure suggested in ***Batson*** the defense is required to establish a prima facie case of discrimination against venirepersons of a racial minority before the burden of production shifts to the state to come forward with race-neutral explanations for the suspect challenges. ***See Batson***, 476 U.S. at 97. The state is equally correct that under the procedure adopted by this Court in ***Antwine*** the state is required to offer its explanations for the challenged strikes without having an opportunity to contest the existence of a prima facie case. ***See Antwine***, 743 S.W.2d at 64.

The fact that the procedure set forth in ***Antwine*** differs from the procedure suggested by ***Batson*** does not, however, establish an impermissible conflict between ***Batson*** and ***Antwine***. The United States Supreme Court has repeatedly emphasized that it has not formulated, and does not intend to formulate, particular rules or procedures for the implementation of ***Batson*** and its progeny. ***Batson***, 476 U.S. at 99 n. 24; ***Powers***, 111 S.Ct. at 1374; ***Edmonson***, 111 S.Ct. at 1089. The states are free to develop procedures for the vindication of ***Batson*** claims, subject, of course, to constitutional constraints. ***See Batson***, 476 U.S. at 99 n. 24; ***Jones v. Jones***, 938 F.2d 838, 844 (8th Cir. 1991). The ***Antwine*** procedures, therefore, need not mirror ***Batson*** so long as they do not offend constitutionally mandated protections.

While requiring the state to provide race-neutral reasons for its strikes each time a defendant raises a ***Batson*** challenge may be somewhat inconvenient for the state, the procedure is not unconstitutional. The establishment of a prima facie case by the defendant is of no independent constitutional significance. Once

an explanation has been offered by the prosecutor or required by the court and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot. ***Hernandez v. New York,*** 111 S.Ct. at 1866; ***United States v. Forbes,*** 816 F.2d 1006, 1010 (5th Cir. 1987); ***State v. Kempker,*** 824 S.W.2d 909, 910 (Mo. banc 1992). The ***Batson*** prima facie case requirements may be significantly altered, ***see State v. Holloway,*** 553 A.2d 166, 172-73 n.4 (Conn. 1989); ***State v. Jones,*** 385 S.E.2d 701, 703 (S.C. 1987), or even completely eliminated, ***see United States v. Lawrence,*** 30 M.J. 1140, 1141 (CMR 1990); ***United States v. Moore,*** 28 M.J. 366, 368 (CMA 1989), without offending against the Constitution. The state, therefore, has no basis for insisting upon the opportunity to challenge the defendant's prima facie case before providing the court with race-neutral explanations.

In the interest of conservation of judicial resources, this Court in ***Antwine*** sought to eliminate the need for an appellate court to remand to the trial court to determine whether the prosecutor racially discriminated in the exercise of the state's peremptory challenges. ***Antwine*** sought to develop a procedure to include the prosecutor's explanations somewhat contemporaneously with the defendant's ***Batson*** objection while all of the relevant participants are present and the events of voir dire remain fresh in the participants' minds. ***See Antwine,*** 743 S.W.2d at 64. The danger of post-hoc rationalizations or fabrications is minimized because the prosecutor is forced contemporaneously to justify the reasons for the strikes.

Although this Court detects no constitutional infirmity in the procedure promulgated by this Court in ***Antwine,*** the Court acknowledges that ***Antwine*** has proven confusing and difficult to apply. The difficulty stems in no small measure from this Court's attempt to consolidate the ***Batson*** inquiry into a unitary

proceeding while continuing to employ the vocabulary of ***Batson*** which contemplates a multistage inquiry. The Court in ***Antwine*** directed trial courts to assess the validity of the prosecutor's explanation, to consider the entire milieu of voir dire both subjectively and objectively, and to focus upon all of the information and intuitive perceptions gathered by the judge to determine whether the prosecutor's use of peremptory strikes proceeded from a racially discriminatory motive. ***Antwine,*** 743 S.W.2d 64-5. In essence, the trial courts were to make the ultimate determination of purposeful discrimination in the context of the prima facie case.

The trial courts were understandably confused as to how to proceed after making the finding that the defendant had established a prima facie case under ***Batson***. The remaining steps of ***Batson,*** requiring the state to come forward with race-neutral explanations, then determining whether the defendant had established purposeful discrimination, seemed meaningless and redundant in view of ***Antwine's*** prima facie case requirements. As a result, the trial courts applied ***Antwine*** sporadically and inconsistently. ***See e.g., State v. Smith,*** 1992 WL 114419 (Mo. App. June 2, 1992); ***State v. Roper,*** 1992 WL 3235 (Mo. App. 1992); ***State v. Hudson,*** 815 S.W.2d 430, 433 (Mo. App. 1991); ***State v. Hunter,*** 802 S.W.2d 201, 204 (Mo. App. 1991). Even this Court ignored the ***Antwine*** directive in holding that it was unnecessary for the trial court to consider the state's explanations for its peremptory challenges before determining that the defendant had failed to establish a prima facie case. ***State v. Burgess,*** 800 S.W.2d 743, 747-8 (Mo. banc 1990). The apparent abandonment of ***Antwine*** in favor of traditional ***Batson*** analysis has left the trial courts without clear guidance as to the proper procedure to follow when a defendant raises a ***Batson*** challenge. ***See State v. Hudson,*** 815 S.W.2d at 433.

To clarify the confusion, this Court enunciates anew the

procedure to be followed by the trial court when confronted with a defendant's timely ***Batson*** objection. First, the defendant must raise a ***Batson*** challenge with regard to one or more specific venirepersons struck by the state and identify the cognizable racial group to which the venireperson or persons belong. The trial court will then require the state to come forward with reasonably specific and clear race-neutral explanations for the strike.[6] ***See Batson,*** 476 U.S. at 98 n. 20; ***State v. Jackson,*** 809 S.W.2d 77, 81 (Mo. App. 1991). Assuming the prosecutor is able to articulate an acceptable reason for the strike, the defendant will then need to show that the state's proffered reasons for the strikes were merely pretextual and that the strikes were racially motivated. ***See Antwine,*** 743 S.W.2d at 64; ***Jones v. Jones,*** 938 F.2d at 844.

In determining whether the defendant has carried the burden of proof and established the existence of purposeful discrimination, the trial court should take into account a variety of factors.[7] ***See Burdine,*** 450 U.S. at 252-53; ***Antwine,*** 743 S.W.2d at 63; ***Jackson,*** 809 S.W.2d at 81. The chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case.[8] ***See Antwine,*** 743 S.W.2d at 65. Any

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[6]As noted above, the prosecutor's explanation will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. ***Hernandez,*** 111 S.Ct. at 1866.

[7]The trial court's determination regarding purposeful discrimination remains a finding of fact that will not be overturned on appeal unless clearly erroneous. ***Hernandez,*** 111 S.Ct. at 1871; ***Antwine,*** 743 S.W.2d at 66.

[8]While prosecutors are free to use "horse sense" and "play hunches" in exercising peremptory challenges so long as the factor they rely on are race-neutral, objective justifications for exercising peremptory strikes against minority venirepersons are most persuasive. ***State v. Kempker,*** 824 S.W.2d

facts or circumstances that detract from or lend credence to the prosecutor's proffered explanations are, therefore, relevant. The existence of similarly situated white jurors who were not struck by the prosecution is certainly probative of pretext. ***See Kempker,*** 824 S.W.2d at 910-11. The degree of logical relevance between the proffered explanation and the case to be tried in terms of the kind of crime charged, the nature of the evidence to be adduced, and the potential punishment if the defendant is convicted is likewise important. ***Antwine,*** 743 S.W.2d at 65. The prosecutor's demeanor or statements during voir dire, ***State v. Jones,*** 747 S.W.2d 229, 231 (Mo. App. 1988), as well as the demeanor of the excluded venirepersons, should be considered. ***Antwine,*** 743 S.W.2d at 65. The court's past experiences with the prosecutor might also be relevant. ***State v. Hunter,*** 802 S.W.2d at 203. Objective factors bearing on the state's motive to discriminate on the basis of race, such as the conditions prevailing in the community and the race of the defendant, the victim, and the material witnesses, are also worthy of consideration. ***Hernandez,*** 111 S.Ct. at 1868; ***State v. Burgess,*** 800 S.W.2d at 747; ***State v. Williams,*** 784 S.W.2d 309, 313 (Mo. App. 1990).

Not all of the factors formerly considered in relation to ***Batson*** remain valid in the wake of recent equal protection jurisprudence. Constitutional constraints upon the prosecution's exercise of peremptory challenges were originally directed toward protecting the defendant's equal protection rights. ***Batson,*** 476 U.S. at 96-97; ***State v. Vincent,*** 755 S.W.2d 400, 402 (Mo. App. 1988). ***Powers v. Ohio,*** however, significantly expanded the scope of ***Batson*** challenges to allow defendants to assert through ***Batson*** challenges not only their own equal protection rights but also the equal protection rights of the

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909, 911 (Mo. banc 1992).

excluded venirepersons. ***Powers,*** 111 S.Ct. at 1373. As a result, the former practice of placing decisive reliance upon the presence of African-Americans on the defendant's jury, ***State v. Burgess,*** 800 S.W.2d at 747, ***State v. Crump,*** 747 S.W.2d 193, 196 (Mo. App. 1988), or the state's failure to use all of its strikes to remove African-American venirepersons, ***State v. Griffin,*** 756 S.W.2d 475, 482 (Mo. banc 1988); ***State v. Robinson,*** 811 S.W.2d at 462-63; ***State v. Ivory,*** 813 S.W.2d 102, 104 (Mo.App. 1991), to undercut any inference of discrimination by the state is no longer valid. The removal of even one African-American person from the venire for racial reasons constitutes a violation of the equal protection clause regardless of the racial composition of the selected jury. ***United States v. Matha,*** 915 F.2d 1220, 1221 (8th Cir. 1990); ***United States v. Battle,*** 836 F.2d 1084, 1086 (8th Cir. 1987); ***see also Alvarado v. United States,*** 110 S.Ct. 2995, 2996 (1990). Likewise, the state's failure to use all of its challenges against minorities does not automatically insulate from constitutional scrutiny strikes directed against other minority venirepersons. ***United States v. Alvarado,*** 923 F.2d 253, 256 (2d Cir. 1991). At most, the state's failure to use all of its strikes against venirepersons of a racial minority, or the presence of a racial minority on the defendant's jury, are relevant factors for consideration only to the extent that they indicate that race was not the prosecutor's motive for the challenged strikes. ***See United States v. Moore,*** 895 F.2d 484, 486 n.5 (8th Cir. 1990); ***United States v. Young-Bey,*** 893 F.2d 178, 180 (8th Cir. 1990).

In sum, this Court continues to find that a unitary procedure for the vindication of ***Batson*** claims is superior to the bifurcated procedure suggested by ***Batson.*** Missouri's procedure better protects the equal protection rights of defendants and venirepersons and facilitates the efficient administration of justice in this state. Finding that the prima facie showing requirement under ***Batson*** is not constitutionally required, ***see Hernandez v.***

New York, 111 S.Ct. at 1866; ***United States v. Forbes,*** 816 F.2d at 1010, trial courts shall no longer make such a finding. Trial courts are directed to conduct an evidentiary hearing to determine whether the prosecutor's strike was racially motivated, as outlined above, once the defendant has properly raised a ***Batson*** challenge.

This case must be remanded to the trial court for a hearing to determine whether the prosecutor used the state's strikes in a discriminatory manner. The trial court shall certify to this Court a record of its proceeding.

Remanded for a hearing consistent with the holding of this opinion.

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Ann K. Covington, Judge

Robertson, C.J., Holstein and Thomas, JJ., concur;
Benton, J., concurs in separate opinion filed;
Price, J., concurs in separate opinion filed;
Prewitt, Sp.J., dissents.

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 74517
	)	
VORNELL PARKER,	)	
	)	
Appellant,	)	
	)	
and	)	
	)	
VORNELL PARKER,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

CONCURRING OPINION

I concur fully but write separately to express concern about the continuing validity of peremptory challenges. ***§ 494.480 RSMo Supp. 1989.***

The principal opinion comprehensively chronicles the expansion of ***Batson***. On its facts, ***Batson*** only covered an African-American defendant and African-American venirepersons struck by the prosecution in criminal cases. 476 U.S. at 82-84. By emphasizing the right of venirepersons to equal protection, subsequent cases now control peremptory challenges by both parties -- regardless of race -- in both criminal and civil cases. ***Georgia v. McCollum,*** 60 U.S.L.W. 4574 (U.S. June 18, 1992); ***Edmonson v. Leesville Concrete Co.,*** 111 S.Ct. 2077 (1991); ***Powers v. Ohio,*** 111 S.Ct. 1364, 1373 (1991). Thus is "the tendency of a principle to expand itself to the limit of its logic...." Benjamin N. Cardozo, ***Nature of the Judicial Process*** 51 (1921).

Based on these decisions, and their equal protection rationale, ***Batson*** may well expand further. Concurring in ***McCollum,*** Justice Clarence Thomas notes recent decisions addressing exclusions of white venirepersons and on the basis of gender. ***McCollum,*** 60 U.S.L.W. at 4580 (Thomas, J., concurring). The United States Supreme Court could hear a case on gender discrimination in its next term. ***See United States v. De Gross,*** 960 F.2d 1433 (9th Cir. banc 1992). The Court of Appeals, Eastern District, has transferred to this Court a case on gender discrimination. ***State v. Pullen,*** No. 56820 (Mo. App. June 9, 1992).

Pullen poses the question whether the equal protection clause of the United States Constitution (or its Missouri equivalent) prohibits discrimination against women in the use of peremptory challenges. Two questions logically arise. First, if gender discrimination in peremptory strikes violates the equal protection clause, does that clause prohibit discrimination against both genders, or only against women? Second, if ***Batson*** covers discrimination against both genders, is this truncated strike so different from the traditional peremptory strike as to lack

legislative authorization?

This second question requires delimiting "traditional peremptory strike." ***§ 494.480 RSMo Supp. 1991.*** If peremptory strikes are those made for any reason whatsoever, then such a strike is constitutionally forbidden. If, on the other hand, a peremptory strike is a strike for an ever-shrinking set of reasons that must be supported by objective evidence, then the strike may be constitutional, but definitely is not a traditional peremptory strike.

With the understanding that these issues are not here resolved, I concur fully in the principal opinion.

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Duane Benton, Judge

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 74517
	)	
VORNELL PARKER,	)	
	)	
Appellant,	)	
	)	
and	)	
	)	
VORNELL PARKER,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

CONCURRING OPINION

I concur with the result and analysis stated in the majority opinion, as it pertains to the facts of the case at hand. However, the facts of the case at hand and, therefore, the opinion as well,

may not reflect the full impact of ***Batson*** and its progeny.[1]

Although each of the ***Batson*** cases decided by the United States Supreme Court dealt with attempts to exclude African-Americans from service on petit juries, the language, logic, and spirit of the cases appear broader. As was most recently stated in ***Georgia v. McCollum,*** ___ U.S. ___, 60 U.S.L.W. 4574 (1992):

> This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. As this Court stated just last Term in ***Powers,*** "[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns." 499 U.S., at ___ (slip op. 9). "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption -- as a *per se* rule -- that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion." ***Ristaino v. Ross***, 424 U.S. 589, 596, n. 8 (1976). We therefore reaffirm today that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party. (Emphasis supplied).

In ***Powers***, at 1370, the Supreme Court emphasized the rights of individuals to serve on petit juries. It stated:

> We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges

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[1]***Batson v. Kentucky,*** 476 U.S. 79 (1986); ***Powers v. Ohio,*** ___ U.S. ___, 111 S.Ct. 1364 (1991); ***Edmonson v. Leesville Concrete Co., Inc.,*** ___ U.S. ___, 111 S.Ct. 2077 (1991); and ***Georgia v. McCollum,*** ___ U.S. ___, 60 U.S.L.W. 4574 (1992).

> to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race. (Emphasis supplied).

The elevated protection required by these cases of the rights of individuals to serve as jurors may extend beyond racial discrimination to religious, gender-based, or ethnic discrimination as well, either under the United States or the Missouri Constitutions. Interestingly, the Missouri Constitution may require greater protection of the right of an individual to serve on a petit jury than does the United States Constitution.

While our Missouri Constitution includes similar equal protection language to that in the United States Constitution, stating: "that all persons are created equal and are entitled to equal rights and opportunity under the law;" ***art. I, § 2,*** it provides further and more specific rights to individuals regarding jury service. ***Article I, § 5,*** provides "that no person shall on account of his religious persuasion or belief . . . be disqualified from testifying or serving as a juror," and ***Article I, § 22(b),*** provides that, "no citizen shall be disqualified from jury service because of sex, . . .".[2]

Thus, whether ***Batson, Powers, Edmonson*** and ***McCollum*** directly prohibit the use of peremptory strikes based upon

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[2]Article I, § 22(b), further provides that, "but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror." This practice was declared to result in a systematic exclusion of women violating the Constitution's fair cross-section requirement in ***Duren v. Missouri,*** 439 U.S. 357 (1979).

religion or sex, they certainly suggest such a result when coupled with Missouri's Constitution.

Although such prohibitions certainly may require a revision of our procedures regarding peremptory strikes, they need not cause the abolishment of peremptory strikes. The long tradition and value of peremptory strikes to our judicial process was duly noted in ***Swain v. Alabama,*** 380 U.S. 202, 831-836 (1965), and is provided for in Missouri by statute, ***§ 494.480, RSMo.*** The survival of this procedure in a constitutionally permissible manner need be neither offensive nor unduly burdensome to our courts and lawyers. Whatever complications that may result are a small price to make citizen participation in our judicial process free from the taint of racial, gender-based, religious, or ethnic discrimination. The trial lawyer may still continue to represent his or her client in the jury selection process by the use of peremptory strikes, when cause does not exist. Such representation simply does not justify unconstitutional discrimination.

Proper jurisprudence dictates that our present ruling be limited to the facts before us. Without the benefit of focused briefing and argument, it is folly now to attempt to define the perimeters of ***Batson*** and its progeny. Skillful practitioners, however, will bear in mind that these perimeters have not been finally set.

William Ray Price, Jr., Judge

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION FOUR

STATE OF MISSOURI,	)	No. 58019
	)	
Respondent,	)	Appeal from the Circuit
	)	Court of the City of
v.	)	St. Louis
	)	
VORNELL PARKER,	)	Daniel T. Tillman
	)	
Appellant,	)	OPINION FILED: January 21,
	)	1992
VORNELL PARKER,	)	No. 59565
	)	
Appellant,	)	Appeal from the Circuit
	)	Court of the City of
v.	)	St. Louis
	)	
STATE OF MISSOURI,	)	Hon. Daniel T. Tillman
	)	
Respondent.	)	OPINION FILED: January 21,
	)	1992

Defendant appeals from his conviction by a jury of possession of cocaine, a controlled substance, and his sentence

as a prior and persistent offender, to seven years imprisonment. He appeals also from the denial, after hearing, of his post-conviction Rule 29.15 motion.

No challenge is made to the sufficiency of the evidence to support the conviction. Police officers, executing a search warrant, observed defendant running from the living room of a neighbor's house into the kitchen where he threw a bag containing a white substance behind the refrigerator. Police retrieved three bags of cocaine from behind the refrigerator.

Defendant first premises error on the failure of the trial court to require the prosecutor to explain his reasons for exercising five of the state's six preemptory [sic] strikes against black veniremen. Prior to any motion by the defendant the court stated:

> "It's a Missouri case that holds when you have a number in excess of the population ratio it's not necessary to have a hearing, but if you want me to make him state why he took them off I will do so."

Defendant's counsel's response to the court's statement was:

> "This will be the defense's motion for ***Batson***, the defense moves to quash the entire jury panel on the motion for mistrial on the basis of the state using five of its preemptory [sic] strikes to strike black jury members on the basis of race alone, in that there were other jurors similarly situated that could have been struck."

That motion was overruled.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) prohibits the use of preemptory [sic] strikes

to exclude persons from jury service based on their race. ***Batson*** held that the burden is upon the defendant to establish a prima facie case of discrimination by showing (1) that the defendant is a member of a cognizable racial group, (2) that the preemptory [sic] challenges permit discrimination by those inclined to discriminate, and (3) that these facts ***and other relevant surrounding circumstances*** raise an inference that the prosecutor used that practice to exclude the venirepersons from the jury on account of their race. The first requirement was eliminated in the subsequent case of ***Powers v. Ohio,*** ___ U.S ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). In ***State v. Antwine,*** 743 S.W.2d 51 (Mo. banc 1987) the court held that the prosecutor's explanation for the reasons for the strikes should be considered by the trial court in determining whether a prima facie case of discrimination was established. In ***State v. Burgess,*** 800 S.W.2d 743 (Mo. banc 1990) the court did not require explanations by the prosecutor in finding that no prima facie case had been established. It held the ***Batson*** challenge insufficient because the defendant had failed to meet the third prong of the ***Batson*** test, i.e. that the first two prongs plus the relevant circumstances raise an inference of discrimination. ***Id.*** [9].

There is a similar failure here. The record does not definitely establish the number of blacks who served on the jury but the briefs indicate the number to be five. The prosecutor did not utilize all of his challenges to remove blacks, a fact which undercuts an inference of discrimination. The record does not establish the race of the state's witnesses or that any tactical advantage might be perceived to accrue to the prosecution from the removal of members of the black race from the jury. ***State v. Burgess,*** supra, [9]. Defendant did not point out which veniremen were similarly situated to veniremen who had been struck. Our independent review of the voir dire establishes that the prosecutor struck each venireman who expressed dissatisfaction with police actions involving the venireman

personally. Those veniremen comprised the bulk of the prosecution's strikes. The remaining strikes involved persons where at least two of the venireman's responses indicated a basis for a pro-defendant bias. The defendant did not accept the court's invitation to require explanations. The sole and only basis in the record for defendant's ***Batson*** challenge is that the prosecutor utilized five of his six strikes against blacks. We have held that where a ***Batson*** challenge is made the trial court should normally require a prosecutorial explanation. ***State v. Robinson,*** 811 S.W.2d 460 (Mo. App. 1991); ***State v. Hudson,*** 815 S.W.2d 430 (Mo. App. 1991). In ***State v. Roper,*** No. 57805 (Mo. App. Jan. 14, 1992) we went further and held that in any ***Batson*** challenge the state ***must*** give an explanation for its challenges.

It is still the law that it is incumbent on the defendant to establish a prima facie case of discrimination in the use of preemptory [sic] challenges. Without the constraints of ***Roper, Robinson*** and ***Hudson,*** we would not be prepared to hold that the striking of black veniremen is sufficient in and of itself to establish a prima facie case and to require a ***Batson*** hearing or to require explanation from the prosecutor. That is all that is present in this case. We are not however free from the constraints of the above cited cases. They mandate that the cause be remanded for an evidentiary hearing on the issue of the state's challenges. We believe, however, that the question of what constitutes a prima facie case in view of ***Powers v. Ohio,*** supra, ***State v. Antwine,*** supra, and ***State v. Burgess,*** supra, is an important issue warranting reexamination of the law by the Supreme Court. The importance of the issue is reinforced by the decisions in ***Edmonson v. Leesville Concrete Co.,*** ___ U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) and ***State ex rel. Riederer v. Coburn,*** No. WD45305 (Mo. App. Dec. 31, 1991) which make ***Batson*** applicable to ***all*** legitimate jury trials, civil or criminal. We therefore transfer this case to the Supreme

Court.

Defendant's two remaining points are raised as plain error because no proper objection was made at the time of trial. We find no error, plain or otherwise, in the court's actions as in neither case was the defendant entitled to the relief he now claims. Discussion of those issues would have no precedential value and the court's actions are affirmed pursuant to Rule 30.25 (b). The post-conviction motion was based on ineffective assistance of counsel in failing to properly object to the prior two matters. As we have determined that such objections would not have entitled defendant to any relief, there is no ineffectiveness of counsel in failing to properly object. The court properly denied the Rule 29.15 motion.

Cause transferred to the Supreme Court.

/s/ GERALD M. SMITH
PRESIDING JUDGE

Karohl, J and Ahrens, J., concur.

APPENDIX C

EXCERPTS FROM THE TRANSCRIPT OF RESPONDENT'S FELONY CRIMINAL TRIAL WHICH BEGAN ON DECEMBER 11, 1989

IN THE CIRCUIT COURT OF
THE CITY OF ST. LOUIS, MISSOURI

STATE OF MISSOURI — Plaintiff

VS. — No. 891-00646A

VORNELL PARKER — Defendant

[TR. 92-93]

THE COURT: May the record indicate that we have qualified the required number for the state?

MR. NELSON: Yes.

THE COURT: For the defense?

MS. DAVIS: Yes, sir.

THE COURT: Okay. To those of you not selected or questioned, would you stand. You stand discharged from further service. I would like to thank you and say that you have assisted in the administration of justice even though you were not selected to try this case. There will be some other requests. I do hope you have an opportunity of hearing a case. Please, feel

good about your service, you have rendered a service second to none.

Would you get your things and go back to the jury assembly room on the 8th floor from whence you cometh. Thanks a lot.

Mr. Dix, give your father my regards.

VENIREMAN DIX: I sure will.

THE COURT: The rest of you just relax where you are.

[Tr. 94-95].

* * *

(Whereupon, the following proceedings were held within the hearing of the jury panel).

THE COURT: Okay, how many do we have? We have ten, how many did he take off?

MR. NELSON: Took off five.

MS. DAVIS: Five, that's my count too, Your Honor.

THE COURT: That's left how many?

MR. NELSON: That left five out of the ten.

THE COURT: It's a Missouri case that holds when you have a number in excess of the population ratio it's not necessary to have a hearing, but if you want me to make him state why he took them off I will do so.

MS. DAVIS: This will be the defense's motion for Batson, the defense moves to quash the entire jury panel on the motion for mistrial on the basis of the state using five of its peremptory strikes to strike black jury members on the basis of race alone, in that there were other jurors similarly situated that could have been struck.

THE COURT: Okay, overruled. You think it's necessary to have a hearing?

MR. NELSON: I'm not going to make a record unless you require me to, Judge.

(Whereupon, the following proceedings were held within the hearing of the jury panel):

THE COURT: Okay, to those of you in the jury box, everybody listen up. If I call your number, those of you in the jury box, I want you to have a seat in the courtroom.

(Whereupon, the jury and one alternate were seated).

THE COURT: Would the state look at the jurors in the jury box and the juror seated adjacent thereto. Is that the jury selected to try this case?

MR. NELSON: Yes, it is, Judge.

THE COURT: For the defense.

MS. DAVIS: Yes, it is, Judge.